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# Supreme Court of the United States

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OCTOBER TERM, 1942.

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No. 193.

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PHILLIPS-BUTTORFF MANUFACTURING COMPANY,  
PETITIONER,

VS.

WILLIAM JOHNSON, RESPONDENT.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF TENNESSEE, AND  
BRIEF IN SUPPORT THEREOF.**

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# Supreme Court of the United States

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## **PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.**

May It Please the Court:

The petitioner, Phillips-Buttorff Manufacturing Company, respectfully shows to this Honorable Court:

## **SUMMARY STATEMENT OF THE MATTER INVOLVED.**

Respondent William Johnson, a nightwatchman formerly in the employ of petitioner Phillips-Buttorff Manufacturing Company, brought this suit in the Chancery Court of Davidson County, Tennessee, to recover for certain overtime payments alleged to be due him under the

Fair Labor Standards Act, 29 U. S. C. A., Sec. 201 *et seq.* The case was tried on a stipulation of facts. The Chancellor granted a recovery and the cause was appealed to the Supreme Court of Tennessee. The Supreme Court of Tennessee, in an opinion for publication filed April 4, 1942, affirmed the judgment. The stipulated facts are in substance as follows:

Petitioner owned and operated a large retail store in a six-story building on Third Avenue North in Nashville, Tennessee, which also contained the executive offices on the second floor, and a tin shop.

Petitioner also owned two other buildings, one of which was on Second Avenue North and the other on First Avenue North, in Nashville, Tennessee. The Second Avenue building was used as a warehouse, and some manufacturing was done in this building. The First Avenue building was a warehouse.

The petitioner had a foundry and warehouse in another part of the city, more than a mile distant from the above named buildings.

The large six-story building on Third Avenue was purely a retail store and there is no provision in the stipulation with respect to any interstate commerce being conducted in this building, even in the day time.

*Sixty-five percent* of all of the business transacted at the other two buildings was stipulated to be wholly *intrastate* business.

Respondent was a night watchman at the retail store. He commenced working at five p. m. and worked until six a. m. the following morning. He covered each of the six floors of the retail store once each hour. Twice each night he was required to leave the retail store and visit the buildings on Second Avenue and First Avenue, the first trip being about 7:30 p. m., and the other trip being about 2:30 a. m. The total time required to visit both of these buildings was thirty minutes, so that on each visit respondent was away from the retail store for a period of thirty minutes. Except for these two visits to

the other buildings respondent remained continuously at the retail store except for a few additional trips to the other buildings on sporadic occasions of a non-recurring type. He had nothing whatever to do with the foundry and had no duties with respect thereto.

Under the stipulation the respondent devoted more than ninety percent of his time to the retail store and less than ten percent of his time to the buildings on First and Second Avenues, where sixty five percent of the goods stored or manufactured was sold wholly within the State of Tennessee. Respondent was away from the retail store only one hour out of the total thirteen hours of service and this one hour was devoted to buildings stipulated to be primarily engaged in intrastate business. Dividing the time devoted to the two outside buildings on a pro rata basis, it results that thirty-nine minutes of this one hour were devoted to intrastate commerce and only twenty-one minutes of the hour were applicable to interstate commerce. Respondent worked only in the night time, and hence no activities of any kind were going on during his employment. Thus respondent devoted twelve out of his thirteen hours to the retail store which, in the absence of stipulation or proof to the contrary (the burden of proof being on respondent), must be deemed to have been engaged during the day time in the ordinary activities of a retail store, to-wit, the sale of merchandise to customers on the premises, and by actual computation less than three percent of his time had even the slightest connection with interstate commerce. This connection consisted of visiting two buildings during the night time, where no work of any kind was in progress and no commerce of any type was being transacted, and which even in the day time were predominantly intrastate in character.

The Supreme Court of Tennessee was of the opinion that respondent was covered by the provisions of the Fair Labor Standards Acts because his activities relating to interstate commerce, while admittedly slight, were ren-

dered each night, and further because the two outside buildings were but a block distant from the retail store and he was subject to call and could readily go to these buildings if an unusual occurrence made his presence necessary.

Petitioner insists that respondent's relation to the production of goods for commerce or to commerce within the meaning of the Fair Labor Standards Act is so tenuous and insubstantial that respondent's occupation does not fall within the protection of the Act, as construed and applied by the Supreme Court of the United States in *A. B. Kirschbaum Co. v. Walling* (No. 910) and *Arsenal Building Corp. v. Walling* (No. 924), October Term, 1941.

#### **REASONS RELIED UPON FOR THE ISSUANCE OF THE WRIT.**

1. The decision of the Supreme Court of Tennessee in the present case involves an important Federal question of substance not heretofore determined by the Supreme Court of the United States.

2. The decision of the Supreme Court of Tennessee in the present case is untenable and is probably not in accord with the applicable decisions of the Supreme Court of the United States and particularly the recent decisions of this Court in *Kirschbaum Co. v. Walling* (No. 910) and *Arsenal Building Corp. v. Walling* (No. 924), October Term, 1941.

Petitioner annexes hereto and presents herewith as a part of this petition a certified copy of the transcript of the record in the case, including the proceedings in the Supreme Court of Tennessee, specification of error, and brief and argument, giving in a more amplified form the reasons why the decision and judgment of the Supreme Court of Tennessee was erroneous and should be reversed,

and respectfully asks that the certified transcript of the record, the specification of error, and brief and argument be considered in connection with and as a part of this petition for the purpose of testing the correctness of the ruling of the Supreme Court of Tennessee.

### **PRAYER FOR WRIT.**

Wherefore your petitioner, Phillips-Buttonoff Manufacturing Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Tennessee, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case on its docket as No. 13, styled William Johnson vs. Phillips-Buttonoff Manufacturing Company, Davidson Equity, and that said judgment of said Supreme Court of Tennessee may be reversed by this Honorable Court, and that your petitioner may have all other and further relief in the premises as the Honorable Court may deem meet and just; and your petitioner will ever pray.

Phillips-Buttonoff Manufacturing Company,  
By CECIL SIMS,  
*Attorney for Petitioner.*

BASS, BERRY & SIMS,  
*Of Counsel.*

# Supreme Court of the United States

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## **BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.**

### **I.**

#### **JURISDICTION.**

(a) The opinion and judgment of the Supreme Court of Tennessee was rendered for publication and filed on April 4, 1942, and is printed on pages 60 to 67 of the record. It has not yet been officially reported.

(b) A final judgment or decree has been rendered in this cause by the Supreme Court of Tennessee, which

is the highest court of the State of Tennessee in which a decision in the suit could be had, where respondent's right is specifically set up and claimed under a statute of the United States of America, to-wit, Fair Labor Standards Act, which right rests exclusively upon an interpretation and application of said Federal statute, and review by certiorari under Section 240 of the Judicial Code, 28 U. S. C. A. 347, is the proper procedure.

## II.

### **STATEMENT OF THE CASE.**

The essential facts, all of which were stipulated, have been summarized in the foregoing petition. Under the stipulation respondent actually spent twelve out of thirteen of his working hours as a nightwatchman in the large retail store. There is nothing in the stipulation to show that any interstate commerce was transacted in this retail store *even in the day time*.

The one hour of working time devoted by respondent to the other two buildings constituted less than ten percent of respondent's working time, and furthermore this hour was devoted to two buildings where no activities were in progress during the night time and where during the day time sixty-five percent of all business transacted related solely to intrastate commerce.

The question presented is whether or not a nightwatchman who regularly devotes more than ninety percent of his time to a retail store not shown to involve interstate commerce, and whose remaining time is devoted to watching buildings which during the day time house activities which are predominantly intrastate in character, is performing work which is so directly related to commerce or the production of goods for commerce as to be within the provisions of the Fair Labor Standards Act.

## III.

**SPECIFICATION OF ERROR.**

The Supreme Court of Tennessee erred in holding that respondent Johnson was engaged in an employment having a substantial relation to commerce and the production of goods for commerce, and that such employment came within the protection of the Fair Labor Standards Act.

## IV.

**ARGUMENT.**

The Supreme Court of Tennessee predicated its conclusions upon its previous decision in *S. H. Robinson & Co. v. LaRue*, 156 S. W. 2d 432, saying:

"We still think it proper to adhere to the ruling made in *S. H. Robinson & Co. v. LaRue*, unless a different ruling is made by a higher authority."

(Record p. 62.)

The case of *S. H. Robinson & Co. v. LaRue*, 156 S. W. 2d 432, involved a nightwatchman whose *entire time* was devoted to watching "materials during the night hours as they were unloaded from trucks, while stored on the yard, and when loaded in freight cars for shipment before the cars were moved."

The nightwatchman in the Robinson case performed no duties excepting those relating directly to commerce; respondent Johnson performed no duties whatever relating to commerce or the production of goods for commerce except during less than ten percent of the time and these duties were performed in connection with two buildings housing activities stipulated to be predominantly intrastate in character. LaRue performed his duties while commerce was actually in progress; Johnson worked only during the night time when no activities were in progress in any of the buildings.

Since the decision in this cause, the Supreme Court of the United States has delivered its opinion in *Kirschbaum, Petitioner, v. Walling, Administrator, and Arsenal Building Corp., Petitioner, v. Walling, Administrator*, Nos. 910 and 924 in this Court, October Term, 1941. Prior to the opinion in these cases the various courts of the land had undertaken to determine whether or not night-watchmen were covered by the Fair Labor Standards Act by devising an abstract formula—searching “for a dependable touchstone” of inclusion or exclusion.

The Supreme Court of North Carolina in *Hart v. Gregory*, 16 S. E. 2d 837, held that the occupation of nightwatchman was not within the provisions of the law, unless the nightwatchman performed additional duties, such as keeping a boiler filled or looking after running machinery.

In *Wood v. Central Sand & Gravel Co.*, 33 Fed. Supp. 40, a Federal District Judge in Tennessee held that a nightwatchman who fired the engine so as to keep up steam and have the engine ready for use each morning was included within the Act.

On the other hand, in *Rogers v. Glazer*, 32 Fed. Supp. 990, a Federal District Judge in Missouri held that a nightwatchman in an automobile graveyard was not within the provisions of the Act even though it was a part of his continuing duty to watch a small amount of scrap iron which was to be shipped in interstate commerce.

In *Lefevers v. General Export Iron & Metal Co.*, 36 Fed. Supp. 838, a Federal District Judge in Texas held that a nightwatchman was included within the Act by distinguishing his case from *Rogers v. Glazer, supra*, upon the ground that the nightwatchman in the latter case performed his services “almost entirely” in connection with a retail store or intrastate affairs.

In its statement of the law this Court, in the recent cases referred to above, in the opinion delivered by Mr.

Justice Frankfurter, made it clear that no fixed formula could be adopted with respect to nightwatchmen and declared that each case must be determined *by its own facts*. In the Kirschbaum and Arsenal Building Corp. cases, the activities conducted in the buildings to which the watchmen devoted their entire time were almost exclusively interstate in character. Mr. Justice Frankfurter said:

"Practically all of the tenants manufacture or buy and sell ladies' garments. Concededly, in both cases the tenants of the buildings are principally engaged in the production of goods for interstate commerce."

This Court therefore held that the watchmen in question, who devote their entire time to buildings in which interstate commerce and production for interstate commerce was in progress, were within the Act, holding that it

"encompasses these employees, in view of their relation to the conceded production of goods for commerce by the tenants."

However, the Court *further* said:

"But the provisions of the Act expressly make its application dependent upon the character of the employees' activities."

And while this Court did not undertake to lay down a rigid *formula*, it did announce the following *principle* which is directly applicable to the present case:

"We cannot, in construing the word 'necessary,' escape an inquiry into the relationship of the particular employees to the production of goods for commerce. If the work of the employees has only the most tenuous relation to, and is not in any fitting sense 'necessary' to, the production, it is immaterial that their activities would be substantially the same if the employees worked directly for the production of goods for commerce."

It is respectfully submitted by petitioner that the slight activity of Johnson in leaving the retail store (*where there was no proof of any interstate activities*) and visiting the two additional buildings which were stipulated to house goods and activities that were sixty-five percent intrastate commerce—activities consuming less than ten percent of his total employment and relating to buildings predominantly intrastate in character—fails to affirmatively show “a close and immediate tie with the process of production for commerce,” and therefore the relation of Johnson’s work to commerce or the production of goods for commerce is so tenuous that it was not in any fitting sense either a part of commerce or necessary to the production of goods for commerce.

It is earnestly submitted that the present petition involves a case well within the quotation made by Mr. Justice Frankfurter near the conclusion of the opinion in the Kirschbaum and Arsenal Building Corp. cases:

“What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation.”

Mr. Justice Cardozo in *Gully v. First National Bank*, 299 U. S. 109, 117.

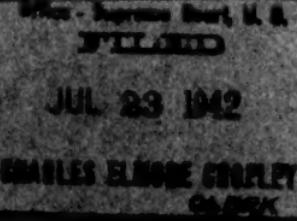
### CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted, and this Court should review the decision of the Supreme Court of Tennessee and finally reverse it.

CECIL SIMS,

Attorney for Petitioner.

BASS, BERRY & SIMS,  
Of Counsel.



(E)

No. 198

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME  
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BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND  
HOUR DIVISION, UNITED STATES DEPARTMENT OF  
LABOR, AS AMICUS CURIAE, IN OPPOSITION

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(1)

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## OPINIONS BELOW

The opinion of the Chancery Court of Davidson County, State of Tennessee (R. 22-28), is reported in 5 Wage Hour Rept. 112. The opinion of the Supreme Court of Tennessee (R. 30-34) is reported in 5 Wage Hour Rept. 300, 160 S. W. (2d) 893.

## JURISDICTION

The decree of the Supreme Court of Tennessee (R. 34) was entered on April 4, 1942. The petition for a writ of certiorari was filed on July 1, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

**QUESTION PRESENTED**

Whether a watchman whose duty it was to guard three buildings in which petitioner carried on commerce and production for commerce, was "engaged in commerce or in the production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

**STATUTE INVOLVED**

The pertinent provisions of the Fair Labor Standards Act, c. 676, 52 Stat. 1060, provide as follows:

**SEC. 6.** (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates— \* \* \*

**SEC. 7.** (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce— \* \* \*

**SEC. 3.** As used in this Act— \* \* \*

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

**STATEMENT**

On January 28, 1941, respondent filed in the Chancery Court of Davidson County, Tennessee, a bill in equity against petitioner, alleging that during the time he was employed by petitioner respondent was engaged in commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act but had not been paid the minimum wage or overtime compensation required by Sections 6 and 7 of the Act (R. 1-4). A decree against petitioner for the unpaid wages plus an added equal amount as liquidated damages and a reasonable attorney's fee was prayed (R. 4). After a demurrer (R. 6) to an amended bill (R. 7-11) had been overruled by the court (R. 11-13), the parties entered into a stipulation of facts (R. 16-22) which constitutes the entire proof in this case. The facts, as stipulated, may be summarized as follows:

Respondent was employed by petitioner for a period of fourteen weeks during 1940 as a watchman to guard against loss by fire, theft or in other manner three buildings owned and operated by petitioner and their contents (R. 19, 21). The three buildings are located, respectively, on First, Second, and Third Avenues, North, in Nashville, Tennessee (R. 16-17). The First Avenue building<sup>1</sup>

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<sup>1</sup> This is in fact two buildings (R. 18); for ease of reference, they are referred to by petitioner and in this brief as a single unit.

is used by petitioner primarily as a wholesale warehouse; 35 percent of the varied merchandise kept there is sold and shipped by petitioner in interstate commerce (R. 18-19). In the Second Avenue building petitioner maintains a shop employing fifty men and a wholesale establishment with a staff of forty employees (R. 17-18). In the shop petitioner manufactures "large quantities" of hardware and bulky metal articles, 35 percent of which are sold and shipped by petitioner in interstate commerce (R. 17). The wholesale establishment handles the products of the shop and also "large quantities" of a wide variety of other goods; 35 percent of the sales of this establishment are in interstate commerce (R. 18). The Third Avenue building contains a retail store, the executive offices for all of petitioner's enterprises,<sup>2</sup> wherein they are directed and managed, and a tin shop (R. 17, 19). It does not appear from the stipulation whether or not goods are produced for commerce in the tin shop (see R. 7-8, 14).

Respondent's regular nightly rounds consisted of hourly inspections of each floor of the Third Avenue building, and two visits per night to each

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<sup>2</sup> Petitioner also owns and occupies a fourth building, located on Twelfth Avenue North, in Nashville, where it manufactures "large quantities" of heaters, stoves, furnaces, and stokers; a major portion of these products are shipped by petitioner to purchasers in other states (R. 19). Respondent did not perform watchman services with respect to this building (R. 19).

floor of the other buildings (R. 19-20). It took respondent one-half hour to cover the First and Second Avenue buildings, which he did twice in each work night of thirteen hours (R. 20, 21), and a half hour to make each round of the Third Avenue building. The scheduled rounds involved registering at a certain time at each of the thirteen call boxes located in the three buildings (R. 20). Between these regular inspections, respondent spent most of his time at the Third Avenue building, except when loiterers or other circumstances indicated that an additional visit to either of the other buildings was desirable (R. 20). Respondent worked a seven-day week of ninety-one hours for a fixed salary of \$15.00, or 16.5 cents per hour (R. 21). It was stipulated that if respondent was entitled to the benefits of the Act, his weekly compensation should have been \$34.65, yielding a recovery of \$275.10 plus an equal sum as liquidated damages under Section 16 (b), and an attorney's fee of \$183.40, or a total recovery of \$733.60 (R. 21).

The Chancery Court held that respondent was covered by the Act and decreed recovery in the stipulated amount (R. 22-29). The Supreme Court of Tennessee affirmed the decree (R. 30-34).

#### **ARGUMENT**

This case does not involve any question of importance or general application in the administration and interpretation of the Fair Labor Stand-

ards Act. It is settled that the activities of a watchman discharging duties such as respondent's may bear the relation to interstate commerce or production for commerce which is the basis of coverage under the Act. *Kirschbaum v. Walling*, No. 910, October Term, 1941, decided June 1, 1942. Nor can there be any doubt that respondent's activities were fully as necessary and important to petitioner's production and interstate business as were those of the watchmen in the *Kirschbaum* case (see R. 19).

Petitioner advances two contentions in support of its view that the relation of respondent's duties to commerce and production for commerce was "tenuous and insubstantial" (Pet. 4). First, it asserts that the business and manufacture carried on at the First and Second Avenue buildings was "predominantly intrastate in character" (Pet. 9, 2, 8). Second, it contends that an insufficient amount of respondent's working time was spent in guarding those two buildings (Pet. 3, 8, 9). Neither contention calls for review of the decree below.

1. The mere fact that 65 percent of the business and production was intrastate in nature does not establish that the remainder was not substantial and important. *Santa Cruz Co. v. National Labor Relations Board*, 303 U. S. 453, 467. The stipulation deals only in terms of percentages, the total

production and shipment being described only as made up of "large quantities" (R. 17-19). The courts below were plainly warranted, from such description and from the apparent scope of petitioner's enterprises, in believing that 35 percent of the total business and production done at the First and Second Avenue buildings was "more than that to which courts would apply the maxim *de minimis*." *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 607; cf. *United States v. Darby*, 312 U. S. 100, 123.

2. Petitioner's assertion that less than 10 per cent of respondent's working time was spent in watching the First and Second Avenue buildings (Pet. 3, 8)<sup>3</sup> is not accurate. One-half of each hour was spent in making the rounds of the Third Ave-

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<sup>3</sup> Petitioner also asserts that "by actual computation less than three percent of [respondent's] time had even the slightest connection with interstate commerce" (Pet. 3). This computation is accomplished by dividing the 10 percent allocated by petitioner to the First and Second Avenue buildings into segments corresponding to the 65 percent interstate and 35 percent intrastate business carried on at those buildings. The inextricable intermingling of the two kinds of business insofar as respondent's protective functions are concerned does not, of course, remove the basis for exercise of the federal commerce power. *United States v. Darby*, 312 U. S. 100, 121-122; *Shreveport Case*, 234 U. S. 342, 351-352; *Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563; *Florida v. United States*, 282 U. S. 194; *Southern Ry. Co. v. United States*, 222 U. S. 20, 26-27; *Moore v. C. & O. Ry. Co.*, 291 U. S. 205, 213-214.

nue building. During the other half of each hour not spent in inspecting the First and Second Avenue buildings, the respondent's services were available at any of the buildings, and while he spent most of such time in the Third Avenue building, he made occasional additional trips to the other buildings as the need arose (R. 19-20). Furthermore, respondent's activities during the periods regularly spent in guarding the executive offices from which all of petitioner's enterprises were managed and directed (R. 17, 19) come well within the rationale of *Kirschbaum v. Walling, supra*. In any event, petitioner's contention that federal regulation of wages and hours of employees whose activities bear the necessary relation to commerce must turn upon the respective number of hours spent on interstate and intrastate business is supported by neither reason nor authority. Cf. *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 616-619; see cases cited *supra*, note 3, p. 7.

#### CONCLUSION

Some of respondent's activities bore a relation to interstate commerce which supports application of the Act under settled principles. The only question presented is whether those activities are of a sufficient quantity. The correctness of the decision below turns entirely upon the particular facts of this case and review by this Court would settle no principles that would necessarily or prob-

ably dispose of other cases under the Act. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,  
*Solicitor General.*

WARNER W. GARDNER,  
*Solicitor,*

MORTIMER B. WOLF,  
*Assistant Solicitor,*  
*United States Department of Labor.*

JULY 1942

(5) FILED

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CHARLES ELIASDE GROPLEY

Supreme Court of the United States

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REPLY BRIEF OF RESPONDENT, WILLIAM  
JOHNSON.

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## REPLY BRIEF OF RESPONDENT, WILLIAM JOHNSON.

### OPINION BELOW.

The opinion of the Supreme Court of Tennessee filed April 4, 1942 (R. 30-34), is reported in 160 S. W. 2d 893.

### JURISDICTION.

The petition for a writ of certiorari invokes the jurisdiction of this Court under Section 240 of the Judicial Code, 28 U. S. C. A., Sec. 347 (Pet. 8). The respondent says that this Court has no jurisdiction under Section 240 of the Judicial Code, 28 U. S. C. A., Sec. 347, to review

by certiorari the final judgment or decree of the Supreme Court of the State of Tennessee in this cause. The said Sections relied upon by the petitioner provide for certiorari in certain cases to the Circuit Courts of Appeals and the Court of Appeals of the District of Columbia, but make no provision whatsoever for review by certiorari of decisions of the highest Courts of the respective States. The petition, therefore, should be denied for the reason that it does not properly invoke the jurisdiction of this Court.

#### **STATEMENT OF THE CASE.**

The respondent filed his suit in the Chancery Court of Davidson County, Tennessee, to recover unpaid minimum wages, unpaid overtime compensation, and liquidated damages, under Sections 6 and 7 of the Fair Labor Standards Act of 1938, Ch. 676, 52 Stat. 1060, 29 U. S. C. A., Secs. 201-219 (R. 1-4, 7-11). The case was tried upon a stipulation of facts (R. 16-22). These facts have been properly summarized in the brief filed by the Administrator of the Wage and Hour Division, United States Department of Labor, as *Amicus Curiae* (See pp. 3-5 of said Brief). The respondent adopts the said summarization of the facts as his own. A further statement of facts will be made in the following argument.

The Chancery Court held that the respondent was entitled to the benefits of the Act and decreed him a recovery (R. 22-29). The decree of the Chancellor was affirmed by a decree of the Supreme Court (R. 30-34).

#### **QUESTION PRESENTED.**

Is a watchman who guards and protects three buildings and all the contents thereof, in one of which his employer has its executive offices, in another of which it has a shop wherein goods are manufactured, and a wholesale store and warehouse from which the products of said shop and other goods are sold, and in another of which his employer has a wholesale warehouse from

which goods are sold, 35% of the aforesaid products of said shop and goods sold from said wholesale stores and warehouses being sold and shipped to purchasers in other States, "engaged in commerce or in the production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act of 1938?

#### **ARGUMENT.**

This case is controlled by *Kirschbaum v. Walling*, 36 L. Ed. 1054 (June 1, 1942). The petitioner seeks to distinguish the cases, asserting, first, that the business carried on by petitioner at the First and Second Avenue buildings was predominantly intrastate in character (Pet. 2, 8, 9), and, second, that the respondent spent only a small portion of his time in guarding and protecting the two buildings and their contents (Pet. 3, 8, 9).

Fifty men worked regularly in the shop where goods were manufactured. Forty men worked regularly in the wholesale store and warehouse. "Large quantities" of goods were produced and sold. 35% of all goods produced and sold were sold and shipped to purchasers in other States (R. 17-18).

Respondent was physically in the building on First Avenue and Second Avenue at least one hour each night. He made additional trips each week to said buildings. He spent thirty minutes out of each hour making his rounds in the Third Avenue building in which were located the executive offices. Most of the time when respondent was not physically making his rounds was spent in the Third Avenue building. The respondent was charged at all times with the responsibility for all the buildings and the contents thereof (R. 19-20). The Chancellor held that respondent was on duty as to all the buildings and the contents thereof during all the hours of his service (R. 25). The Supreme Court of Tennessee held the same (R. 33).

The Fair Labor Standards Act of 1938 does not require that any definite percentage of employer's busi-

ness be of an interstate character, or that an employee spend any definite percentage of his time in interstate commerce or in the production of goods for interstate commerce as a requirement of coverage. *United States v. Darby*, 312 U. S. 100, 123, 85 L. Ed. 609, 622; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 607; *Santa Cruz Co. v. National Labor Relations Board*, 303 U. S. 453, 467; *Wood v. Central Sand & Gravel Co.*, (D. C. W. D. Tennessee) 33 F. Supp. 40. The amount of goods protected by respondent and moving in interstate commerce was very substantial, and the maxim *de minimis* could not possibly have any application thereto. The petitioner's allocation of respondent's time between interstate business and intrastate business (Pet. 3-8) is wholly artificial and inaccurate. However, even if the respondent had spent only 10% of his time in the production of goods for interstate commerce, he would under the foregoing authorities be entitled to a recovery.

Respectfully submitted,

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